STATE INTERFERENCE WITH THE ENFORCEMENT OF TREATIES: SOME MEANS OF PREVENTION [1]

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ALL sane Americans will agree that interference by any state of the Union with a treaty to which the United States is a party is a breach of good faith the seriousness of which is magnified by the commission of the offense by public authority on American soil. It must be obvious also that the United States, in which the power to contract and deal with the outside world is lodged exclusively in the federal government, cannot avoid responsibility for local infractions of a treaty, by pleading the failure of Congress to enact laws necessary to effect prevention. Lack of legislation required to enable a nation to fulfil an international obligation, contractual or otherwise, never affords a defense in law for the consequences of such inaction. As Mr. Root declared in 1910: "It is to be hoped that our government will never again attempt to shelter itself from responsibility for the enforcement of its treaty obligations to protect foreigners, by alleging its own failure to enact the laws necessary to the discharge of those obligations." [2]

It is worth while to consider how state interference with a treaty of the United States can be prevented or minimized. Such an inquiry calls for examination of certain prolific causes of complaint by foreign countries. The most numerous instances have been those where a state has neglected to perform adequately its duty of doing justice to resident aliens, or what may be described as its duty of jurisdiction, which by treaty the United States has directly assumed. Certain of our conventions provide, for example, in substance, that the citizens of

[1] Address delivered at the National Conference on Foreign Relations of the United States, held under the auspices of the Academy of Political Science, at Long Beach, N. Y., May 31, 1917.

[2] See Proceedings American Society of International Law, vol. iv, p. 25.

each of the contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and enjoy in this respect the same rights and privileges as are granted to natives. When, therefore, a state of the Union entrusted with the administration of criminal justice within its territory, neglects to use the means at its disposal to protect aliens within its custody from mob violence, or neglects to use those means to prosecute persons responsible for resulting injury or death, the treaty is grossly violated. The wrong done is, moreover, aggravated when officials who are necessarily agents of the nation for the protection of the alien or the prosecution of his assailant, connive at, aid or encourage lawlessness.

Cases of mob violence directed against aliens within the United States have recurred with deplorable frequency. Spanish subjects were victims at New Orleans in 1851, Chinese subjects at Denver in 1880 and in Wyoming in 1885, Mexicans were sufferers in California in 1895, and Greeks as well as aliens of other nationalities at South Omaha in 1909. Resident Italians have been periodic victims and have furnished an appalling list of cases. Italians were lynched at New Orleans in 1891, in Colorado in 1895, in Louisiana in 1896 and again in 1899, in Mississippi in 1901, in Florida in 1910, and (I regret to relate) in my own state of Illinois in 1914 and 1915. In no one of these cases was a single perpetrator convicted of crime. In the case of Alberto Piazza, who was lynched by a mob in Illinois in October 1914, indictments were found, but the failure to convict served to encourage rather than deter the mob which nine months later in another county, took from jail and lynched one Giuseppi Speranza.

The reason why resident aliens have been subjected to such treatment has been twofold: first, race antagonism or opposition to colonies of aliens of a particular nationality; and secondly, a well-founded confidence that no serious criminal prosecution awaited an offender. The administration of criminal justice by state authorities has proved in such cases to be farcical because of the notorious reluctance of juries impaneled

from among the neighbors of the murderers to return indictments, and their determination never to convict when the victims are aliens against whom, regardless of actual guilt, there is prejudice and ill-will. The writer has witnessed the indignation shown by Governor Dunne of Illinois, because of the complete failure of the judicial department of the state to cope with the foregoing conditions. Under the existing system the local machinery of justice breaks down, and its collapse serves to deprive the alien victim of rights which the citizen would be accorded under similar circumstances, and which a treaty has solemnly assured. This circumstance teaches a plain lesson, which has a distinct bearing upon the treatment of resident aliens generally throughout the United States, and upon the respect for treaties purporting to safeguard their lives and property. It proves that in as much as the local judicial system works injustice to the resident alien, and fails to protect him from violence to which he ought not to be subjected, he is entitled to different procedure and to different instrumentalities than are available to citizens of the state. The necessity of affording the alien some beneficial discrimination is not for the purpose of providing him with advantages unclaimed and not enjoyed by citizens, but simply to put within the reach of the former such measure of justice as is assured by treaty, and which state authorities both judicial and administrative are impotent to render. We are not unfamiliar with legislation discriminating in favor of aliens. Section 16 of article XVI of the Federal Judiciary Act provides, for example, that the United States district courts shall have jurisdiction " of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States." [1]

Why should not the federal courts be given jurisdiction in criminal cases likewise, where the offense charged is the commission of violence against the person of an alien in contravention of a treaty? To quote President Taft, " We should not be obliged to refer those who complain of a breach of such an obligation to governors of states and county prosecutors to

[1] With reference to this act see Frederic R. Coudert in Proceedings American Society of International Law, vol. v, p. 196.

take up the procedure of vindicating the rights of aliens which have been violated on American soil." [1] Such legislation as a means of enabling the federal government to perform its contractual obligations has been urged by Presidents Harrison, McKinley and Roosevelt. President Taft, moreover, expressed the opinion that the federal government under the Constitution was not lacking in power to defend, and protect aliens, and to provide procedure for enforcing the rights given to them under American treaties. The purpose of the writer is not, however, to discuss the constitutionality of such legislation, but rather to point out the fact that unless Congress enacts such a law, there is no reason to hope that mob violence directed against aliens in our midst will cease to recur and to heap shame upon our institutions. We are familiar with a condition of affairs that can be dealt with only by one process. We must either resign ourselves to the sad but sure expectation of witnessing repeated defiance of our compacts described by the Constitution as the supreme law of the land, whenever passion and hatred of the resident alien assert themselves, or we must have the courage and tenacity of purpose to take the only alternative. An appropriate act of Congress cannot change the past, but it may spare us from future disgrace, and shield us from charges of a kind which no enlightened nation or individual can bear without chagrin.

State interference with American treaties may manifest itself in other ways. It may, for example, assume the form of legislation discriminating against the rights of aliens in defiance of agreement, or it may express itself in the definite unwillingness of state officials, administrative or judicial, to respect or give proper recognition to existing compacts. It is not believed that there prevails in any state of our Union a general desire to violate the treaties of the United States, and thus to defy our own Constitution as well as our international undertakings. It is well that the Constitution denounces the acts of a state and of its authorities in contravention of a treaty, and so precludes the possibility of a conflict between a treaty and a state law on equal terms. As the latter is, therefore, subordinate to the former, it only remains

[1] See Proceedings American Society of International Law, vol. iv, p. 44.

in theory to point out the conflict in order to nullify an illegal statute or an act of interference on the part of a local authority. In practice, however, difficulties arise, partly because of astonishing unfamiliarity with our fundamental law, and partly because of honest doubt whether a proposed enactment or a particular act of a state official does in fact violate any existing treaty. Such uncertainty of mind and the resulting diversity of opinion as to the correct interpretation of a treaty, are in many cases due to the vagueness of the provisions expressing the agreement of the contracting parties. As treaties are oftentimes the result of compromise, the diplomatic achievement of opposing plenipotentiaries may prove to be a sorry document, exhibiting neither clearness of thought nor precision of statement. For example, a convention of the United States purporting to clothe consular officers of the contracting parties with the right to administer the estates of countrymen dying intestate, has been deemed in certain quarters to confer a privilege of administration on consular officers superior to that of public administrators in any state. The latter have vigorously opposed the assertion. The highest tribunals in half a dozen states have been called upon to pass upon the controversy. They have generally decided it in favor of the state officials, and have had much reason for so doing, on account of the ambiguity of the treaty. The volume of litigation that has ensued, the substantial expense involved, and the confusion of thought manifested on every side, have all been the direct result of loose drafting. If there has been in this instance any state interference with an international obligation of the United States, it is attributable to the technical yet grave failure of both contracting parties to express clearly their actual design.

What the President and Senate have deemed to be a proper subject of international agreement has never been regarded otherwise by the Supreme Court of the United States. The test of propriety which has guided the federal government has been simply the desirability or need of the particular treaty concluded. Nevertheless, the trend of recent judicial opinion, manifest in decisions of state tribunals in consular cases, is to the effect that if a treaty of the United States is designed to regulate a

matter such as the administration of estates (said to be commonly committed to state law), and to restrict a normal privilege of state officials, that intention should be clearly expressed in language unmistakable. Such an attitude on the part of the courts emphasizes the importance of clearness of mind and exactness of expression on the part of those who negotiate treaties in behalf of the United States which purport to touch upon matters likely to affect the relations between the several states of the Union and aliens resident therein. The continued employment of uncertain phrases lending themselves to divergent interpretations is bound to produce narrow judicial construction of privileges conferred upon aliens, and to tend in consequence to arouse complaint from abroad. It is suggested that difficulty may frequently be avoided by direct reference in a treaty to those forms of state legislation or discrimination against nationals of the contracting parties which it is sought to prevent. Thus in a treaty with Italy concluded February 25, 1913, an article of an earlier convention of 1871 was replaced by a provision declaring that:

> The citizens of each of the High Contracting Parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault, and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs.[1]

This treaty was for the purpose of protecting Italian subjects in the United States from adverse discrimination in the operation of state as well as federal compensation laws. Our government had the wisdom and courage by means of the convention to inform definitely every state legislature of certain legislation which it could not lawfully enact. It happened that about two years ago the lower branch of the legislature of a certain western state was about to endeavor to incorporate in its workmen's compensation law a discrimination against alien employees. About an hour before a vote was to be taken, the writer showed to the members of the committee in

[1] Charles's Treaties, p. 442.

charge of the bill the text of the compact with Italy. The chairman disavowed authorship of the discriminatory provision, pleaded ignorance of the treaty, and struck out the noxious clause upon the reading of the bill.

In the conclusion after the war of fresh treaties with numerous European states, the United States will doubtless find impressive the interest manifested by European governments in the protection of the persons and property rights of their nationals resident in America. Certain countries may be expected to show as great concern over the safety and welfare of such individuals as over any other subject of negotiation. The United States has every reason to respond generously and wisely. In so doing it will have occasion to accept provisions dealing directly with the relations between the states of the Union and aliens who in increasing numbers are to live within their domain. Our success in accomplishing this task depends upon the skill with which our government avoids the danger of encouraging subsequent local interference. The point to be observed is, that that danger does not necessarily depend upon the scope and breadth of privileges which it is reasonable and just to confer, but rather upon the absence of clearness and directness with which the text of the agreement brings home to state authorities those restrictions which the President and Senate deem it wise to impose. In a word, the danger to be avoided is loose drafting and confusion of thought. With these eliminated, state interference with our future treaties will be reduced to a minimum.

By way of conclusion, two general suggestions are submitted for your consideration. The first is, that for the prevention of offenses against the treaty rights of aliens in our midst, with respect to the protection of their persons and property, an act of Congress clothing the federal courts with appropriate jurisdiction is imperative. The second is, that we must undertake to draft our new treaties with a special view to frustrating, by their very terms, state legislative or administrative interference otherwise to be anticipated.